BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH R. GREENLEE	)	
Claimant	)	
	)	
VS.	)	
	)	
U.S. BOILER WEST	)	
Respondent	)	Docket No. **1,049,467**
	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 9, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found Ralph R. Greenlee met his burden of proof to establish that he was injured at work on June 23, 2009, and that he aggravated his injury at work on July 24, 2009 as well as on October 2, 2009.

Respondent requests review of whether the ALJ erred in finding Greenlee's accidental injury arose out of and in the course of employment with respondent.

Greenlee argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Respondent is an emergency high temperature repair service. The business primarily goes to power plants or refineries where a high temperature area needs a repair. The employees wear protective heat and flame resistant protective suits with self-contained breathing and air conditioning. This allows the employees to work in confined areas with temperatures from 600 to 1300 degrees. Typically, the repairs are done by welding or cutting and grinding.

Ralph Greenlee became employed as a boilermaker for respondent in July 2008. His job required him to travel to different power plants and refineries. On June 23, 2009, Greenlee was standing next to an opening in a boiler tank when a co-worker, Buddy Hare, dove out of the opening where he was working because of a problem with the air hose to his breathing tank. Greenlee testified he grabbed Hare but was pulled over by his weight and Greenlee felt a strain in his lower back. Greenlee reported the accident to his supervisor, Tim Rankin, the same day. Greenlee never sought medical treatment after this incident as he thought his back pain was merely a strain that would improve.

Rankin testified he was at the job site when Greenlee was injured on June 23, 2009. Rankin talked to Buddy Hare, Steven Moore and Jill House regarding the incident.

Greenlee was then sent to another job in Arizona. On July 24, 2009, he was required to crawl down some scaffolding to work in a hole when he twisted his back and was unable to finish the job. Greenlee made a telephone call to Charlie House, respondent's owner/manager, seeking chiropractic medical treatment. After the second incident in July 2009, Greenlee was referred to a chiropractor for treatment. Rankin and Charlie House agreed to split the medical bills incurred with the chiropractor. But Charlie House denied he was aware that Greenlee was alleging a work-related injury.

Although Greenlee was provided restrictions, he went to a job in California and on October 2, 2009, he climbed 30 feet up a ladder and aggravated his back condition. Greenlee continues to have problems with his back.

At the preliminary hearing, Hare testified that Greenlee did not have any physical contact with him when he came out of the hole. John Lipe, an employee of respondent, testified he helped Hare out of the hole and Greenlee did not physically assist him in helping Hare out of the hole. Lipe further testified that he was aware Greenlee had prior back problems and wore a brace. James House, an employee of respondent and Charlie House's son, testified Greenlee was about three feet from him and asked whether he could help when Hare came out of the hole. James House was aware that Greenlee had previously worn a brace for back support.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[1] A claimant must establish that his personal injury was caused by an "accident arising out of

[1] K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

and in the course of employment."[2] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[3]

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[4] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[5]

Greenlee testified regarding three work-related accidents that injured his back. His supervisor admits he was told about the accidents and testified that he and respondent's owner agreed to split the cost of Greenlee's chiropractic treatment instead of processing the accident as a worker's compensation claim. Three co-workers disputed Greenlee's version of the first accident and the respondent's owner denied being told Greenlee was alleging a work-related accident when the discussion about chiropractic treatment occurred.

This Board Member finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe Greenlee and respondent's representatives testify in person. In approving Greenlee's request for medical treatment, the ALJ apparently believed his testimony over the respondent's representative's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

Greenlee, alleged an injury and then subsequent aggravations due to discrete trauma's at different job sites. Although there is conflicting testimony regarding the initial injury, there is no such dispute regarding the subsequent incidents. And as previously noted, an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. Based upon the record compiled to date, this Board Member affirms the ALJ's finding that Greenlee suffered accidental injury arising out of and in the course of his employment.

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[2] K.S.A. 2009 Supp. 44-501(a).

[3] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[4] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated March 9, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[6] K.S.A. 44-534a.

[7] K.S.A. 2009 Supp. 44-555c(k).